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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HENRY HARPER, *et al.*,
Petitioners,

v.

VIRGINIA DEPARTMENT OF TAXATION

On Writ of Certiorari to the Supreme Court of Virginia

REPLY BRIEF

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The Department of Taxation labors to support the retroactivity decision below, but on each front its arguments fall well short. Similarly, its argument that petitioners are not entitled to relief even upon retroactive application of *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), is without merit. Petitioners are entitled to refunds of the taxes unconstitutionally imposed on their federal pensions, either under Virginia's refund statute or directly under the Fourteenth Amendment. For the reasons stated in petitioners' opening brief, and for the reasons stated herein, the decision of the court below must be reversed with instructions to grant petitioners' refunds.

I. THE COURT BELOW ERRED IN CHOOSING TO IGNORE 4 U.S.C. § 111 AND *DAVIS*

In petitioners' opening brief, we asserted that the court below erred in choosing not to apply 4 U.S.C. § 111 and

Davis to resolve this controversy. We argued that *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), requires that *Davis* be applied retroactively; that this Court has never relied on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), or any other form of nonretroactive decisionmaking to sanction departure from an unambiguous congressional mandate; and that even if purely prospective decisionmaking is ever appropriate, *Davis* must be applied retroactively. The Department of Taxation, and the states and other entities that have filed briefs in its support, focus their arguments principally on this last point. For the reasons stated here and in our opening brief, however, this Court need not even reach the issue of the applicability of *Chevron* to reverse the court below. Yet even if the Court were to reach the merits of the lower court's *Chevron* analysis, the decision below nonetheless must be reversed.

A. *Beam* Requires That *Davis* Be Applied Retroactively

The Department of Taxation acknowledges that the central hold in *Beam* is that once this Court has applied its ruling to the parties in one case, all other courts must apply that ruling to litigants before them. *See* Res. Br. at 4. Similarly, it acknowledges that the Court applied its holding to the litigants in *Davis* (Res. Br. at 5) and did not specificalffily reserve the question of retroactivity. Res. Br. at 6 n.3. Nonetheless, arguing essentially that this Court could not have meant what it said in *Beam* (Res. Br. at 5), it suggests that the issue of the retroactivity of *Davis* remains open. The Department of Taxation's wishes notwithstanding, *Beam* is dispositive of this appeal.

Although *Beam* produced six separate opinions, on at least two points the Court was unanimous. *First*, no opinion questioned Justice Souter's repeated observation that full retroactivity is "overwhelmingly the norm" in civil litigation, 111 S. Ct. at 2443, so much so that it "goes without saying." 111 S. Ct. at 2445. *See e.g.*, 111 S. Ct. at 2451 (O'Connor, J., dissenting) ("the usual course in cases before this Court is to apply the rule of

law announced to the parties in the case."). *Second*, the Court fully agreed that "[b]ecause the *Bacchus*[1] opinion did not reserve the question whether its holding should be applied to the parties before it, . . . it is properly understood to have followed the normal rule of retroactive application in civil cases." 111 S. Ct. at 2445. *See* 111 S. Ct. at 2448 (White, J., concurring in the judgment) ("*Bacchus* may reasonably be read as extending the benefits of the judgment in that case to the appellant Bacchus Imports.") (citation omitted); 111 S. Ct. at 2451 (O'Connor, J., dissenting) ("the most reasonable reading of [*Bacchus*'] silence is that the Court followed its customary practice."). *See also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2787-88 (1991) (O'Connor, J., dissenting) (recognizing that the majority's failure to address the issue of retroactivity translated to full retroactive application of the decision).

The Department of Taxation suggests that because there was only one sentence in *Davis* dealing with the issue of remedy, this Court in *Davis* did not resolve the issue of retroactivity. Yet as *Beam* and *Lampf* make clear, *Davis* would command retroactive effect even if there had been no mention of remedy. Undeniably, the Court in *Davis* did not reserve the question of its retroactivity. Thus, the Court was at most "silent" on the issue of retroactivity. That being so, even setting "[q]uestions of remedy aside," *Davis* "is fairly read to hold as a choice of law that its rule should apply retroactively to the litigants before the Court." 111 S. Ct. at 2445.

Moreover, the Department of Taxation is simply wrong in asserting that Michigan's concession somehow dilutes the force of the Court's conclusion that Mr. Davis was entitled to a remedy. Had Michigan not conceded that its refund statute provided an adequate remedy (such that the Court need not retroactively impose a tax on the favored class (No. 87-1020, Brief for Appellee at 63)),

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[1] *Bacchus Imports, Ltd v. Dias*, 468 U.S. 264 (1984).

this Court would have done just what it did in *Bacchus*, *Williams v. Vermont*, 472 U.S. 14, 28 (1985), and *Exxon Corp. v. Eggerton*, 462 U.S. 176, 196-97 (1983): remand for consideration of remedial issues.

The Department of Taxation complains that it would be unfair to hold it and others to the concession made by Michigan. Res. Br. at 6. This complaint is unfounded, for it confuses two separate issues: 1) entitlement to *a* remedy; and 2) determination of the proper remedy in a particular case. To be sure, Michigan's concession may have driven the determination that a refund was the appropriate remedy, but it did not drive the determination that a remedy was required. It is the determination that a remedy is required, not the particular form of relief granted, that is binding on all other courts as a matter of equality and *stare decisis*.[2]

Thus, the Department of Taxation is left to argue that this Court could not possibly have meant what it said in *Beam*. *See* Res. Br. at 6-7 n.3. According to the Department of Taxation, this Court must have meant in *Beam* that principles of equality and *stare decisis* prevail only in the rare case where the issue of retroactivity was briefed and argued in this Court. Of course this is not what *Beam* says, and *Beam*'s rejection of modified prospectivity does not admit of any exceptions. Moreover, this Court was well aware of the *Davis* refund litigation when it decided *Beam*, *see* Brief *Amici Curiae* of the

[2] *Amici Curiae* National Governors' Ass'n, *et al.* contend that *Davis* merely accepted Michigan's concession that a refund was required as a matter of state law and thus *Davis* did not reach the federal question of retroactive application of the decision. *Amici* Br. at 11. *Davis*' citation to *Iowa-Des Moines Bank v. Bennett*, 284 U.S. 239 (1931), however, independently supports the conclusion that refunds were the required remedy. In any event, irrespective of whether the refund was a product of state law (*i.e.*, Michigan's concession) or federal law (*i.e.*, *Iowa-Des Moines Bank v. Bennett*), the question of remedy would not have arisen unless this Court had determined to apply its holding to the parties before it. It is this determination, that a remedy is required as a matter of federal law, that is dispositive for purposes of *Beam*.

States of Alabama, *et al.*, No. 89-680 at 6-11; so too was it aware when it decided *Davis* that twenty-two other states imposed a similar discriminatory tax on federal retirees. *See* 489 U.S. at 822 n.3 (Stevens, J. dissenting).

Lastly, the Department of Taxation argues that if this Court did mean what it said in *Beam*, then because *Davis* was decided before *Beam*, *Beam* itself should not apply retroactively. To this, is should suffice to say that even though *Bacchus* was decided before *Beam*, *Beam* was nonetheless applied retroactively. In any event, given *Beam*'s recognition that there is no precedent for modified prospectivity in the civil arena, the Department of Taxation can hardly contend that *Beam* established a new principle of law.

B. This Court Cannot Change The Effective Date Of A Congressional Enactment

We stressed in our opening brief that the retroactivity question posed in this case is unique: here the Court is not being asked simply to defer the implementation of one of its decisions; rather it is being asked to declare that an Act of Congress became effective over fifty years after it was lawfully enacted. Yet this Court does not sit as a superlegislature, empowered to redraft congressional enactments to comport with its own notions of wisdom or equity. Rather, its role is to discern the legislative intent, and, having done so, to enforce Congress' will.

The totality of the response to this argument is two footnotes, one in the Department of Taxation's brief (Res. Br. at 11-12 n.10), and one in the Brief *Amici Curiae* of the National Governors' Ass'n, *et al.*, at 15-16 n.7. The Department of Taxation contends that in *Chevron* this Court delayed the implementation of a federal statute (43 U.S.C. § 133(a)(2)). Additionally, it cites *Florida v. Long*, 487 U.S. 283 (1988), and *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), to refute petitioners' point. The National Governors' Ass'n adds *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 384 (1940), to this list.

These authorities hardly support the proposition, necessary to sustain the decision below, that this Court may utilize nonretroactivity to supervene the expressed will of Congress. In *Chevron* this Court held that "the *Louisiana* one-year statute of limitations should not be applied retroactively." 404 U.S. at 107 (emphasis added). The Court did not say that 43 U.S.C. § 133(a)(2) only became effective on the date it decided *Chevron*; rather, it held that because litigants relied on prior circuit authority allowing a longer period of limitations, equity demanded that the shorter Louisiana statute of limitations be tolled. *Id.* Tolling of a statute of limitations is not judicial defiance of that statute; to the contrary, even in suits against the United States, allowing tolling is "likely to be a realistic assessment of legislative intent." *Irwin v. Veterans Admin.*, 111 S. Ct. 453, 457 (1991).

Similarly, neither *Florida v. Long*, nor any other Title VII pension case, represents an instance when this Court has deviated from a congressional mandate in the name of nonretroactivity. Rather, as we stated in our opening brief, Pet. Br. at 16-17, these are cases in which the Court's nonretroactive relief was anchored in Title VII's specific remedial provisions. *See* 42 U.S.C. § 2000e-5(g) (authorizing courts to order such "equitable relief as the court deems appropriate."). *Northern Pipeline Const. Co.* is a case in which this Court stayed its judgment *invalidating* a statute to enable Congress to enact another provision; rather than standing for defiance of a statute, this case demonstrates the deference this Court accords Congress in fulfilling its constitutional function. Finally, *Chicot County Drainage District* cannot be cited as an example of this Court utilizing nonretroactivity to supervene an Act of Congress. Indeed, *Chicot County Drainage District*, which also involved the invalidation of a statute, is a *res judicata* case, not a retroactivity case. *See* 308 U.S. at 378 (holding that final judgment obtained under a statute subsequently declared unconstitutional is nonetheless preclusive).

What the Department of Taxation asks this Court to do in this case is not remotely similar to anything it has

ever done before. Congress passed the Public Salary Tax Act in 1939 and therein waived the United States' immunity for nondiscriminatory state taxation of "compensation, *received after December 31, 1938*, for personal services as an officer or employee of the United States." 53 Stat. 575 (emphasis added). In 1989, this Court held that Congress meant just what it said: states cannot tax compensation for personal services as an employee of the United States, including retirement pay, if they do not tax the same compensation of state employees. *Davis*, 489 U.S. at 815. The Department of Taxation now asks this Court to amend the Public Salary Tax Act to read "compensation, received after December 31, *1988*." The Department of Taxation does not ask this Court to toll a statute of limitations, or stay a judgment invalidating a congressional enactment: it asks this Court to change a deliberate and unambiguously enacted provision of law. Plainly, the Court has no such license.

C. *Chevron* Analysis, Even If Apt, Would Yield Retroactive Application Of *Davis*

For the reasons stated above (as amplified in our opening brief (Pet. Br. at 6-18)), this Court need not even reach the issue of the continued viability or application of *Chevron*. But even to entertain the merits of the decision below, the Court would first have to definitively establish "the bounds [and] propriety of pure prospectivity." *Beam*, 111 S. Ct. at 2448.

To our argument that *Chevron* could not reach a case such as this, the Department of Taxation lamely asserts "[s]urely there is room in legal doctrine" to consider its "equitable" plea in determining the legality of the conduct at issue here. Res. Br. at 11. Its equitable claim, however, is only that it had been ignorant of the law (Res. Br. at 32), and that this ignorance should not cost it money. By its ignorance, the Department of Taxation has taken uncounted billions of dollars from elderly, infirm and often impoverished pensioners; it is the height of arrogance and insensitivity for the Department of

Taxation now to argue that it would be inequitable for it to return a mere fraction of its ill-gotten gains. Why there must be room in legal doctrine for this type of self-serving argument is not apparent.

This Court's recent cases show a marked reluctance to engage in nonretroactive decisionmaking. Other than in Title VII pension cases (and by the narrowest of margins in *American Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990)), in no other civil case over the past decade has this Court applied its holding nonretroactively. Indeed, even where this Court has avowedly established a new principle of law, it refused to apply its decision nonretroactively. *See Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 485-86 (1989). As we stated in our opening brief, if *Chevron* analysis may ever be used as a choice of law vehicle, then it may only be used in cases involving overturning of established precedent or revolutionary resolution of questions of first impression. Pet. Br. at 21-23. Under no set of circumstances could *Davis* satisfy this test.

1. Davis *did not establish a "new principle of law"*

The Department of Taxation strives vainly to identify two "new" principles of law supposedly enunciated by *Davis*. Its arguments on this score are specious: in no sense did *Davis* represent "an avulsive change which caused the current of the law thereafter to flow between new banks." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968). At the threshold, however, the Department of Taxation's arguments on this score are irrelevant.

Specifically, the Department of Taxation contends that *Davis* announced a new principle of law in holding that federal retirement benefits are compensation (Res. Br. at 16) and in holding, essentially, that Justice Stevens' dissent is not the law. Res. Br. at 18. The central premise of nonretroactivity jurisprudence is reliance; *i.e.*, reconciliation of "the constitutional interests reflected in a new rule of law with reliance interests founded upon the old."

Lemon v. Kurtzman, 411 U.S. 192, 198 (1973). The Department of Taxation does not claim, however, that it relied on the "old" law supposedly supplanted by *Davis*. Rather, it admits that it was wholly ignorant of 4 U.S.C. § 111 and its application to federal annuities (Res. Br. at 32), and it repeatedly and inappropriately castigates petitioners for not having educated it. Thus, even if *Davis* had established a new principle of law, that would have been pure fortuity as far as the Department of Taxation is concerned, for it relied solely upon its own ignorance, and not any principles of law supposedly discarded by *Davis*, in collecting the taxes at issue here.

That the Department of Taxation did not foresee *Davis* is apparent. But the principles underlying *Davis* were easy enough to discern, had it looked. It never looked, however, and its only excuse for this failure is that petitioners never asked it to.[3] The Department of Taxation suggests that "this Court is unlikely ever to see a stronger case of reliance and settled expectations," Res. Br. at 11 n.10, but reliance and settled expectation borne solely of ignorance are hardly the type sufficient to justify nonretroactive decisionmaking.

Moreover, the Department of Taxation's insistent reference to the lack of a prior legal challenge provides it no solace, for this too is irrelevant. No matter when the challenge was brought, it still would have sought four years' back taxes. Thus, had petitioners brought suit sooner, the only difference would be that the total amount of unconstitutional taxes the Department of Taxation could shelter behind its statute of limitations would be

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[3] The Department of Taxation acknowledges that federal retirees voiced their complaints about the inequity of Virginia's discriminatory tax to the legislature. Res. Br. at 39. Certainly at that time the Department of Taxation should have inquired into the legal validity of its brazenly discriminatory tax. Had it done so, in light of *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), and *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376 (1960), it would have had to have concluded that its tax was of dubious validity, at best.

reduced. If anything, the fact that the Department of Taxation improperly profited for fifty years .from its violation of 4 U.S.C. § 111 adds further weight to petitioners' claim for the refunds of the last few years of the unconstitutional taxation.

Similarly flawed is the Department of Taxation's suggestion that the fact that its unconstitutional statute stood unchallenged for fifty years "is compelling—indeed conclusive evidence—that *Davis* established a new principle of law." Res. Br. at 13. If so, then *Bacchus* must too have established a new principle of law, for the statute at issue in *Beam* had been on the books for over fifty years and indeed had been upheld by Georgia's Supreme Court in 1939. *Beam*, 111 S. Ct. at 2455. So too *Ashland Oil Inc. v. Caryl*, 497 U.S. 916 (1990), must have been wrongly decided, for the statute at issue there had been in force for over fifty years and, like Georgia's statute (but unlike Virginia's), had been upheld by the state's highest court. *See Columbia Gas Transmission Corp. v. Rose*, 459 U.S. 807 (1982). Any legitimate repose interests the Department of Taxation might have are adequately protected by its statute of limitations, which limits its exposure to four tax years.[4]

In any event, the reasons this case did not come forward sooner have much more to do with economics than law. While the Department of Taxation queries "Where were petitioners' tax lawyers?", Res. Br. at 12, it should realize that tax lawyers are luxuries few federal retirees need or can afford. Indeed, it is significant that the cost of print-

[4] The Department of Taxation and certain *amici* suggest that a refund to petitioners would be a windfall. As petitioners understand it, the argument goes "because petitioners did not know the taxes were unconstitutional when they paid them, they do not deserve to get them back." This would seem to be an argument only a taxing authority could make. By this definition, because Virginia does not require payment under protest as a prerequisite to obtaining a tax refund (Res. Br. at 40, n.48), and because the vast majority of taxpayers do not knowingly overpay their taxes, virtually every tax refund Virginia pays would equally qualify as a "windfall."

ing the Joint Appendix in this case alone exceeds the amount of refund any petitioner could expect to realize. Given these gross economic disparities, the truly remarkable fact is that *Davis* was brought at all, not that it was not brought sooner.

In its best light, the Department of Taxation's argument is that 4 U.S.C. § 111 and the intergovernmental tax immunity doctrine are obscure. But obscurity plus time cannot equal justifiable reliance. The question is not *did* the Department of Taxation see *Davis* coming; the question is *could it* have seen it coming. And, had it looked, either in 1942 when Virginia enacted the statute, or in 1985, the earliest tax year in dispute here, it would have discovered that its tax was in serious jeopardy.

Federal retirement benefits are, and have always been, compensation. The Department of Taxation contends that *Davis* created a new principle of law in holding that federal retirement benefits are "compensation for personal services as an employee" within the meaning of 4 U.S.C. § 111. To be sure, this Court had never faced the question, prior to *Davis*, whether federal annuities are compensation within the meaning of 4 U.S.C. § 111. But in answering this question, the Court did no more than analyze the plain language of the statute and "apply settled precedent to a new set of facts." *United States v. Johnson*, 457 U.S. 537, 551 (1982). This kind of ordinary decisionmaking is not a candidate for nonretroactivity.

The Department of Taxation does not dispute, as it cannot, that Congress intended federal civil service benefits to be deferred compensation. *See e.g.*, 59 Cong. Rec. 6900 (Apr. 29, 1920) (federal pensions "should be looked upon as deferred wages."). Indeed, in 1953, Virginia's own Attorney General recognized that civil service retirement benefits are compensation for federal employment. *See* 1952-1953 Va. Op.Atty.Gen. 184-85 (1953).[5] *See also* Az.

[5] The Attorney General stated that a "retired civil employee of the United States Goverment, . . . receiving a pension as such" is barred

Op.Atty.Gen. 60-9-L (1959) (concluding that "federal civil service retirement income" is "compensation for personal service . . . as an officer or employee of . . . the federal government."). For the Department of Taxation now to contend that *Davis* established a new principle of law in holding that federal pensions are compensation is disingenuous. When it enacted its discriminatory tax in 1942, Virginia must have known, as this Court had held, that the constitutional interdiction of discriminatory taxation applies "whether the taxed income be salary *or some other form of compensation.*" *Graves v. New York ex rel. O'Keefe*, 306 U.S. at 486-87 (emphasis added). If *Davis'* treatment of federal annuities as compensation came as a surprise to the Department of Taxation, it has no one to blame but itself.

Davis *did not establish a new principle of law in rejecting Justice Stevens' dissent.* The Department of Taxation contends that *Davis'* second new principle is essentially its rejection of Justice Stevens' dissent. According to the Department of Taxation, prior to *Davis* it had no clue that a tax that singled out the state for preferential treatment *vis-a-vis* all others, including the federal government, violated intergovernmental tax immunity principles. This argument is dispelled by *Davis* itself.

Foremost, the Court in *Davis* rejected the dissent's argument that intergovernmental immunity principles only prohibit the states from singling out the federal government for discriminatory treatment. The Court held:

> In *Phillips Chemical Co.*, however, we faced that precise situation: an equal tax burden was imposed on lessees of private, tax-exempt property and lessees of federal property, while lessees of state property paid a lesser tax, or in some circumstances, none at all. Although we concluded that "[u]nder these circumstances there appears to be no discrimination

from holding public office in Virginia because "active or retired civil service employees who receive compensation are [statutorily] excluded from holding public office."

> between the Government's lessees and lessees of private property," 362 U.S. at 381, we nonetheless invalidated the State's tax.

489 U.S. at 815 n.4. Thus, far from establishing a new principle of law, *Davis* specifically anchored its holding in precedent.

Moreover, the language of the dissent itself is fatal to the Department of Taxation's argument:

> Arguably, the Court's holding today is merely a logical extension of our decisions in *Phillips Chemical Co.* and *Memphis Bank & Trust v. Garner*, 459 U.S. 392 (1983). Even if it were, I would disagree with it.

489 U.S. at 824 (Stevens, J., concurring) (citation omitted). The dissent then goes on to challenge the holding in *Phillips*. 489 U.S. at 825 (Stevens, J., dissenting) ("The troublesome aspect of the Court's opinion in *Phillips* . . .").

Thus, *Davis* reveals a near unanimous Court concluding that its decision was compelled by *Phillips* and *Memphis Bank & Trust*, and a dissent that acknowledges that the decision may be "merely a logical extension" of those precedents. How the Department of Taxation can argue that this is the stuff of "new principles of law" is difficult to comprehend. By definition, a "logical extension of precedent" is not "an avulsive change [in the] current of the law." *Hanover Shoe, Inc.* 392 U.S. at 499.[6]

[6] The Department of Taxation contends that even after *Phillips* it had no clue that discriminatory taxation of federal compensation was impermissible. Other states, however, were quicker to discern the principles of nondiscrimination underlying the Public Salary Tax Act. *See, e.g.*, N.C. Code Ch. 158, § 317.1 (1939) (including federal "salaries, wages [and] other compensation" in the definition of gross income, provided "such income shall not be included in gross income, unless salaries, wages or other compensation received from the State of North Carolina . . . is subjected to income taxes imposed by the United States."). *See also* Legislative History of Ch. 293, Laws of Wisconsin 1939, Original Bill 1672 (recognizing that "salaries of federal officers, employes or other persons shall be

2. *The purposes underlying the intergovernmental tax immunity doctrine and the balance of the equities favor retroactivity*

In our opening brief, we argued that retroactive application of *Davis* would further the purposes of the intergovernmental tax immunity doctrine and the Supremacy Clause. The Department of Taxation's sole noteworthy response to this argument is the puzzling assertion that "petitioners suffered no harm to a right that is personal to them." Res. Br. at 27. Presumably, the Department of Taxation does not view having to pay an unconstitutional tax, or having property seized for refusing to pay such a tax, as "suffering a personal harm." Suffice it to say that petitioners feel the harm inflicted upon them quite directly; the legislature's indifference to their pleas and its refusal to amend its discriminatory tax until forced to do so by this Court, only add insult to their injury.

The Department of Taxation's position is most outlandish in its assertion that refunding a fraction of the money it unconstitutionally collected from petitioners would be inequitable. Of course the Department of Taxation does not respond to our argument that its equitable plea puts a premium on massive constitutional violations: from the states' perspective, the greater the constitutional violation the better, for then the greater the equitable claim not to right the wrong. Nor does the Department of Taxation tell us how it is that the constitutionality of its actions can hinge on the state of its fisc—could it truly be that a different result would ensue had this case been brought in Wisconsin before that state distributed a $250 million surplus? *See* Brief *Amicus Curiae* of The Military Coalition, at 18-19 n.16. And of course, the Department of Taxation does not provide the calculus by which this Court can determine when the state's cost of answering for its

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subject to no greater or different tax than the salaries of officers, employes or other persons of this state.").

unconstitutional acts becomes so high that the underlying conduct must be treated "as if" it were constitutional.[7]

The Department of Taxation's sole equitable claim is that a refund will cost a lot of money.[8] While federal retirees can only hope to see a dime of every dollar Virginia has unconstitutionally taken from them over the past decades, every penny the Department of Taxation now claims it would be inequitable to repay has been taken out of petitioners' pockets. The question becomes whether it is more equitable to leave this unconstitutional taking in place, and thus make a small and in many ways disadvantaged class of taxpayers bear its cost, or to distribute this loss to all the taxpayers in Virginia. In petitioners' view, merely to pose this question is to answer it.

At bottom, the Department of Taxation's argument is that this Court should allow states' purely parochial interests to dictate the reach of an unambiguous federal stat-

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[7] The courts are particularly ill-suited for the inquiry the Department of Taxation suggests should govern this case: "Where is the money better spent?" Nor would it be seemly for courts to determine whether states in fact have the revenues to pay the refunds. *See, e.g.*, Wash. Post, Mar. 2, 1991, § B, at 3, col. 5 ("The potential cost of the [retirees'] lawsuit was cited by Gov. L. Douglas Wilder . . . as one of the reasons for retaining a $200 million rainy-day fund in the current budget."). *See also* Wash. Post, Feb. 20, 1992, § B, at 5, col. 1 ("Virginia lawmakers have discovered that they have an $88 million windfall [because] the state had $1.1 billion more in its employee retirement fund than needed."); Winston-Salem Journal, Aug. 4, 1992, at 14, col. 1 (North Carolina "ended its fiscal year . . . with a balance of $164.8 million in the General Fund.").

[8] This Court has never balked at ordering relief simply because large sums are involved. For example, in *American Bank and Trust Co. v. Dallas County*, 463 U.S. 855 (1983), this Court invalidated state taxes that gave rise to a refund claim of over $400 million in one state alone. *See* Note, "Protecting Federal Securities From Indirect State Taxation: *American Bank & Trust Co. v. Dallas County*," 37 Tax Law. 457, 465 n.78 (1984). *See also Aloha Airlines v. Hawaii Director of Taxation*, 464 U.S. 7, 14 n.10 (1983) ("We acknowledge that our interpretation . . . may result in the disruption of state systems of taxation; we are, however, bound by the plain language of the statute.").

ute. This argument wholly subverts the Supremacy Clause, for there is no principled basis for arguing that it is only the equities inherent in retroactivity jurisprudence that are sufficient to supervene a federal statute. And, if any state's perceived equities can negate an Act of Congress, then the Supremacy Clause will become a nullity. Petitioners see no equity in traveling down this path.

II. PETITIONERS ARE ENTITLED TO REFUNDS EITHER BY VIRTUE OF VIRGINIA'S REFUND STATUTE OR DIRECTLY UNDER THE FOURTEENTH AMENDMENT

The Department of Taxation argues that even if *Davis* is retroactive, petitioners are not entitled to relief. Neither Virginia's refund statute nor the Fourteenth Amendment, the Department of Taxation argues, provides petitioners an avenue of relief for the deprivation of property they sustained. The Department of Taxation is wrong on both scores, however, for the Constitution guarantees at a minimum that petitioners be afforded a "clear and certain remedy." *McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 39 (1990). Petitioners are entitled to refunds of the taxes unconstitutionally imposed upon them, and if Virginia's statute does not so provide, then the Fourteenth Amendment does.

The Department of Taxation starts by arguing that it is a "well-settled feature of Virginia law that equitable considerations were to determine the retrospective reach of decisions holding tax statutes unconstitutional." Res. Br. at 36. Thus, according to the Department of Taxation, Virginia's refund statute does not reach claims such as petitioners'.

This argument is astonishingly wrong; indeed, "it is like the thirteenth stroke of a crazy clock, which not only itself is discredited but casts a shade of doubt on all previous assertions." A. P. Herbert, M.P., *Uncommon Law* (Methuen & Co., Ltd. 1952) at 28. The retrospective

reach of a decision of this Court is a question of *federal* law, not state law. *Beam*, 111 S. Ct. at 2443. And, "[i]n order to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, [this Court has] consistently required that state courts adhere to [its] retroactivity decision." *American Trucking Ass'ns*, 496 U.S. at 178.

Moreover, if it was "well-settled" that Virginia's refund statute did not reach claims such as petitioners,[9] then it is difficult to understand why the General Assembly, "consistent with [its] notions of fairness to its citizens" (Res. Br. at 32), amended the refund statute to extend the limitations period for federal retirees to file refund claims. Indeed, given that the avowed purpose of the extension of the statute of limitations was to "protect[] the rights of federal retirees . . . until the retroactivity issue is finally decided by the courts," Joint Subcommittee Studying Taxation of Public and Private Retirement Benefits Initial Staff Report (Aug. 1989) at 4, even if Virginia's refund statute would not previously have reached petitioners' claims, it does now.[10]

Even if Virginia's statute did not reach petitioners' claims, however, they nonetheless would be entitled to relief under the Fourteenth Amendment.[11] As this Court held in *McKesson*,

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[9] *But see Corning Glass Works, Inc. v. Department of Taxation*, 402 S.E.2d 35, 40 (Va.), *cert. denied*, 112 S. Ct. 277 (1991) (reversing denial of refund of unconstitutional assessment of corporate income tax.)

[10] The Department of Taxation should be embarrassed to recall that in arguing to dismiss a related case filed in the United States District Court for the Eastern District of Virginia, it averred that Virginia's refund statute provided a "plain, speedy and efficient remedy." *See*, Defendants' Memorandum of Law in Support of Motion to Dismiss, *Lewy v. Commonwealth of Virginia* (E.D. Va. Apr. 24, 1989) at 4-6.

[11] The Department of Taxation's assertion that petitioners did not raise this argument below (*e.g.* Res. Br. at 36 n.42) is specious. *See* Reply Brief for Appellants (Nov. 27, 1990) at 13-15 (Reply

> [t]o satisfy the requirements of the Due Process Clause, . . . the State must provide taxpayers with not only a fair opportunity to challenge the accuracy and legal validity of their tax obligations, but also a "clear and certain remedy" for any erroneous or unlawful tax collection to assure that the opportunity to contest the tax is a meaningful one.

496 U.S. at 39, *quoting Atchison T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912). The Department of Taxation argues that *McKesson*'s requirement of a "clear and certain remedy" is limited to cases "where it is entirely foreseeable at the time of enactment that a tax will be contested and likely invalidated." Res. Br. at 38. But plainly *McKesson* is not so limited. *See, e.g.*, 496 U.S. at 31 ("the question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no . . ."). Indeed, the Department of Taxation's suggested standard is tantamount to the qualified immunity standard under 42 U.S.C. § 1983; yet there is no requirement that a taxpayer demonstrate bad faith to be entitled to a remedy for the unconstitutional taking of his property.

The Department of Taxation's argument that *McKesson* is inapposite because Virginia provides a meaningful predeprivation remedy is similarly flawed. First, because Virginia's refund statute provides petitioners relief, it is irrelevant whether they may have had another means by which to recover the unconstitutional taxes. *McKesson* does not stand for the proposition that a state may ignore its own refund statute (and thus deny retroactive relief) simply because there may be a predeprivation redemy. If, as the Department of Taxation contends, Virginia has "provide[d] broader relief than is required by the Constitution," 496 U.S. at 52 n.36, it nonetheless may not curtail that refund right and thus deprive a taxpayer of

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Brief section captioned "Absent a statutory entitlement to relief, the Fourteenth Amendment would mandate refunds"). *See also* Res. Br. at 46 (responding to this argument).

"all existing remedies." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930).

More fundamentally, the Department of Taxation is simply wrong in asserting that Virginia provides a meaningful predeprivation remedy. That the Tax Commissioner may have discretion to settle claims of questionable constitutionality (Res. Br. at 47) does not provide petitioners with a "certain" remedy. And while the Department of Taxation suggests that the Tax Commissioner can determine that a tax is unconstitutional, in fact he has no such authority under Virginia law. *See Holland v. Johnson*, 403 S.E.2d 356, 357-58 (Va. 1991) (only the courts have the power "to expound the laws and adjudicate cases."). *See also James City County v. Rowe*, 216 S.E.2d 199, 205 (Va. 1975) (because administrative tribunal could not avoid the command of the statute "there was no administrative remedy equal to the relief sought."). It is a familiar tenet of administrative law that "[o]nly the courts have authority to take action which runs counter to the expressed will of the legislature," K. Davis, *Administrative Law Text*, § 20.04 at 388-89 (3d ed. 1972), and Virginia is no exception. If the Tax Commissioner exonerates taxpayers from paying taxes he determines to be unconstitutional, he is acting beyond his authority. In any event, suffice it to say it is far from "clear" that the Tax Commissioner has this authority.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of Virginia denying petitioners entitlement to refunds of taxes imposed on their federal pensions in violation of 4 U.S.C. § 111 and the intergovernmental tax immunity doctrine of the Supremacy Clause must be reversed. *Davis* must be applied retroactively and, either under Virginia's refund statute or directly under the Fourteenth Amendment, petitioners must be paid refunds.

Respectfully submitted,

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